IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 386 OF 2000

Ratnakar Dattatraya Patade ..Appellant
(Ori.Plaintiff)

versus

Smt. Smita Pandurang Dalvi
& Ors. ..Respondents

WITH

FIRST APPEAL NO. 387 OF 2000

Smt. Smita Pandurang Dalvi
& Ors. ..Appellants

versus

Ratnakar Dattatraya Patade
& Ors. ..Respondents

ALONG WITH

SUIT NO. 350 OF 1993

M/s. Deshmukh Associates ..Plaintiffs

versus

Ratnakar D. Patade & Ors ..Defendants

Mr. P. S. Dani i/b. Chitnis Vaithy & Co. for Appellant in First Appeal No. 386 of 2000.

Mr. R. S. Apte with Mandar Limaye for Respondents. in First Appeal No. 386 of 2000.

Mr. Milind Vasdev i/b. Milan Bhise & Co, for the Plaintiff in High Court, OOCJ Suit No. 350 of 1993.

Mr. Vaibhav Joglekar i/b. Niranjan Jagtap & Co. for Respondent Nos. 2 to 4, 6, 8, 10, 11, 14, 16 to 18, 21 to 26, 32, 35 and 38 in F.A. No. 386 of 2000, for Respondent Nos. 2,3,5,8,11,13,14,17 to 20, 27 and 28 in First Appeal No. 387 of 2000 And for Defendant Nos. 3 to 5, 7, 9, 11, 12, 15, 17 to 19, 22 to 27, 33, 35, 36 and 39 in Suit No. 350 of 1993.

Mr. Vasant Shankar Sawant, one of the flat purchaser is present in person.

CORAM : D. G. DESHPANDE,J.

DATE : 31ST MARCH, 2005

ORAL ORDER :

1. Suit No. 350 of 1993 is filed by the contractor i.e. M/s. Deshmukh Associates, it is still pending. In Bombay City Civil Court Suit No. 442 of of 1993 was filed by the Chief Promoter, that

suit was dismissed, and therefore these appeals are filed.

2. The suit of the contractor was for recovery of his charges for construction of the building wherein in all 39 flat purchasers were residing. Now at this stage when the matter was assigned to me Respondents in appeal No. 386 of 2000 i.e. Respondent Nos. 2, 4, 6, 8, 10,11, 14, 16, 17, 18, 21, 22, 23, 24, 25, 26, 32, 34, 35 and 38, i.e. in all 20 respondents have shown their willingness to pay their respective charges to the contractor because the suit of the contract was against all the individual 39 flat owners. Whatever be the reason for compromise, the fact remains, after hearing Mr. Vasant Shankar Sawant, one of the flat purchaser, who is present and claims that he represents 16 other flat purchasers, only 9 persons are in occupation of their respective flats and all other flats are vacant. Therefore the anxiety of the flat purchasers, who want now to compromise the matter with the contractor is to get back the possession of their respective flats. All these persons are out of possession for last 24 years because of this dispute. List of the flat purchasers along with the amount to be paid by them to the Court Receiver since January 1996 and extra amount of Rs.70,000/-, which each of them have agreed to pay to the

contractor, was given to me. All these respondents / defendants who have been named in the list and referred by me above, want to settle the matter with the contractor by paying the dues of the contractor as per the statement. The statement showing the names of persons and amount is taken on record.

3. This move of the 20 respondents, as stated above, was strongly opposed by Mr. Dixit, Advocate. He is absent today and Mr. Vasant Shankar Sawant states that he has been authorised by the remaining 16 flat purchasers and Mr. Dixit to make his submissions in this regard. He also brought to my notice that he has moved the Chief Justice for transfer of this case from this court to some other court, so far as no order of transfer is produced. 20 Respondents, out of whom 18 respondents are present, who are ready to agree to the consent terms, don't want this case to be transferred for any reason whatsoever because it was not that the proposal for compromise was moved or initiated by me, the parties came before the court with a proposal of compromise, which was opposed by Mr. Dixit for his clients, and now the opposition is firstly, on the ground that the contractor was engaged by the promoter in personal capacity, that his claim is totally unjustified and exorbitant, that Chief Promoter Pathade has been removed and

that in the suit of the contractor there was a counter claim which was filed by all the 39 occupants and flat purchasers. Therefore, in the circumstances if the compromise is allowed to be recorded, then it will frustrate the counter claim. My attention was also drawn to the provisions of Order XXIII Rule 3 of the Code of Civil Procedure and Judgment of the Supreme Court reported in **AIR 2003 Supreme Court 2686 Dwarka Prasad Agarwal (D)by L.Rs. and Anr. vs. B. D. Aagarwal and others.** The matter before the Supreme Court was arising in the following background:

. A partnership firm known as M/s. Dwarka Prasad Agarwal and Brothers, was constituted with Dwarka Prasad Agarwal, Bishambhar Dayal Agarwal and Mahesh Prasad Agarwal all sons of Keshav Dev Agarwal in the year 1972 as partners thereof. Each partner contributed to the capital. Dwarka Prasad Agarwal was the karta of HUF consisting of himself and his partners. The firm transferred business of publication of "Dainik Bhaskar" to a newly incorporated Company Bhaskar Publications and Allied Industries Pvt. Ltd. One Ramesh Chandra Agarwal filed a Declaration on 30.10.1984 along with an authority letter dated 10.1.1983 from Dwarka Prasad Agarwal in respect of publication of Dainik Bhaskar at Indore. Another document was also came to be

executed. According to the appellant before the Supreme Court Dwarka Prasad Agarwal never signed the Deed of Partition or Family Settlement nor it was acted upon. Several proceedings were initiated at different places, then a Writ petition came to be filed being 802 of 1992. During the pendency of the writ petition some of the parties entered into a Deed of Settlement. It was filed before the Madhya Pradesh High Court to the effect that respondents had reached a full and final settlement of the disputes raised in the petition and other connected matters pending before various courts. This settlement was accepted and the writ petition was disposed of on 29.6.1992 and the matter went to the Supreme Court.

. The question before the Supreme Court was whether in public law remedy the High Court could record the compromise to dispose of the writ petition. Supreme Court took into consideration the provisions of Section 141 and also Order XXIII Rule 3 and held in paragraph 36 that:

> **"Even if the provisions of O. 23 R. 3 of the Code of Civil Procedure and/or principles analogous thereto are held to be applicable in a writ proceeding, the Court cannot be permitted to record a purported**

compromise in a casual manner. It was suo moto required to address itself to the issue as to whether the compromise was a lawful one, and, thus, had any jurisdiction to entertain the same."

4. Party opposing the compromise i.e. Mr. Vasant Shankar Sawant, also drew my attention to another judgment of this court reported in **1988 Mh.L.J. 874 Harshadbhai Shah & Anr. vs. Rani Kamla Raje & ors.** In that case a compromise petition was not signed by all the parties, as many as 5 parties did not sign the compromise and 7 parties did not verify the same. but the court directed that the decree be drawn accordingly. The question therefore was whether there was a lawful compromise and satisfaction was recorded by the court. Order XXIII Rule 2 of CPC is absolutely clear in this regard. It permits the court to record the compromise when the suit is adjusted wholly or in part by lawful agreement or compromise. Thereafter the court has to verify that it is in writing and signed by the parties.

5. So far as present compromise is concerned all the signatories are defendants to the suit and respondents to the Appeals, in their individual capacity, it is their personal interest in the

matter. Those who wanted to enter into compromise with the contractor have signed the consent terms. Therefore, there no question of binding other non-agreeing respondents or defendants by this compromise. This compromise is between the respective respondents / defendants vis-a-vis the contractor and the financial or monetary liability of the respondents /defendants by the compromise is that liability comes to an end as against individual respondents and he gets back possession of his flat of which he is in dire need. There is nothing on record to show that this compromise is not lawful agreement. Even the person i.e. Mr.Vasant Sawant opposing compromise has not contended that any of the signatories have signed this compromise against his Will or desire or that any force, fraud or misrepresentation was practiced upon them. Those who do not want to compromise the matter, as on today, have not filed any consent terms or compromise terms. Therefore, only because some persons do not agree with the proposal of compromise, particularly in the nature of the suit instituted by the contractor for fixing the liability on each of the respondents or flat owner, there are no reasons not to accept these compromise. I do not find any substance in any of the objections raised by Mr. Vasant Sawant for himself as well as for 16 other flat owners.

6. While accepting compromise, it has to be noted that out of 39 persons who are owners of the flat, only 9 persons or 10 persons are in possession, others are without any roof on their head for the last 24 years and it is only because of a dispute about the payment of the contractor. Therefore, in view of the compromise between those defendants / respondents and the contractor there are no reasons to deprive those flat owners of their right to reside in the house. The compromise will end the dispute as between them individually and they will get back possession of the house, for which contractor has agreed. So far as apprehension of Mr. Vasant Sawant, that his counter claim will be frustrated, it is clarified that the counter claim will continue, this compromise will not come in the way of counter claim and the decision on merits will decide the fate of the counter claim.

. This move to seek transfer of this matter from this court is not at all bonafide. It is nothing but an attempt to create obstacle in the way of the persons who want to enter into compromise with the contractor. For last 24 years the persons are without roof on their head. What must be the plight of these persons can be imagined. Many attempts must have been made for compromise and

failed. But now when such a large number of flat owners want to enter and record the compromise then this opposition by some and their attempts to get this matter transferred on flimsy grounds, is nothing but a malafide attempts.

. If a party wants to get his case transferred to other court we generally do not have any objection, but here in this case I find that this move to transfer is motivated and the ulterior motive is to deprive the flat purchasers who are waiting for getting the possession of their flat and of the roof over their head which they are bound to get because of the compromise. Therefore, that prayer for transfer or stay till the transfer orders are passed, is outright rejected.

7. Counsel for the contractor contended that Suit No. 350 of 1993 was filed when the firm was not registered. He therefore seeks liberty to withdraw the suit. Now according to him, the firm is registered, he therefore seeks liberty to withdraw the said suit No. 350 of 1993 with liberty to file a suit afresh. Permission to withdraw the suit and liberty to file fresh suit is granted. Refund of court fees in Suit No. 350 of 1990 as per the Rules.

8. So far as Appeal arising out of Bombay City Civil Suit No. 442 of 1992 is concerned, the contractor be impleaded immediately as a party respondent No.40 in First Appeal No. 386 of 2000 and Respondent No. 10 in First Appeal No. 387 of 2000.

9. The appellants in the respective Appeals will immediately amend the appeal.

10. 20 persons who have decided to enter into a compromise and whose list is given to me. Names of all the 20 signatories of this compromise were called out and it was verified from them that they are willingly entering into a compromise. Only two persons out of 20 i.e. C. N. Deshpande and J. D. Patade are absent today and are represented by their counsel. All the Consent terms are therefore taken on record and accepted and marked 'X' for identification. Undertakings in each of them are accepted. They are duly signed by the parties and their respective Advocates.

11. Consent terms filed in Suit No. 350 of 1992 and in BCCC Suit No.442 of 1992, therefore treated as consent terms in both the appeals. Therefore there shall be a decree in view of the consent terms in B.C.C.C. Suit No. 442 of 1992 in respect of

these respondents.

12. Court Receiver to act on copy of this order as well as consent terms / compromise terms filed in the above matters.

13. Prayer of Mr. Vasant Sawant for stay of this order, is rejected.

14. Certified copy expedited.

31.3.2005 (D.G. DESHPANDE, J.)